error (who disputed the validity of the passage of an act, and yet did not raise the question by pleading) precludes the possibility of such a ruling." "Finally, in *The People* v. *The Supervisors, &c.*, 4 Seld. 317, without giving any reason or citing any authority to sustain it [the court], did distinctly lay down the doctrine, in a case where it was certainly entirely unnecessary to have considered the question at all:" *Evans* v. *Browne*, 30 Ind. 514.

Why the solemn attestation of three officers—the chosen officers of the two houses, and the governor, who all report to the general assembly in open session that they have signed a certain bill, and that it is a law, thereby giving the assembly the opportunity to enter a protest against the bill becoming a law, or to repeal it—should be overcome by a mere journal entry of a negligent clerk, it is difficult to see. To say that the provisions of a constitution require the journal to show the yeas and nays, or that a certain thing was done with respect to the passage of a bill,—that these must appear affirmatively on that journal to render a bill valid is to put something into the constitution that is not there; and to cast an imputation of dishonesty or carelessness upon two other great and co-equal departments of the government is unworthy of the judiciary. It is simply another illustration of that grasping greed of power in the courts everywhere so dangerously and alarmingly visible, and which cannot be too soon guarded against. To our minds the reasoning in *Evans* v. *Browne*, and *State* v. *Young*, is conclusive.

W. W. THORNTON.

Crawfordsville, Ind.

Court of Appeals of Kentucky.

McCRACKEN COUNTY v. MERCANTILE TRUST CO., ET. AL.

Where a cause of action is barred by the Statute of Limitations in force at the time the right to sue arose, and until the time of limitation expired, the right to rely upon the statute as a defence is a vested right that cannot be divested by a subsequent act of the legislature extending the period of limitation.

APPEAL from McCracken Common Pleas Court.

L. D. Husbands, for appellant, McCracken County.

W. G. Bullitt, for appellees, Mercantile Trust Co., and another.

HOLT, J.—The appellee, Marcella Laurie, was the owner, in 1873 and 1874, of a lot of land in McCracken county, which was assessed for taxation for those years for county purposes. The taxes remaining unpaid, the county collector, on December 17th 1874, sold the property to satisfy the amount owing for 1873; and on March 8th 1875, he again sold it for the taxes of 1874; the county in each instance becoming the purchaser at the price of the taxes due upon it. Subsequently the Mercantile Trust Company purchased the property. On the 18th of February 1884, the legislature passed an act, the first section of which provides "that in all cases where

real estate in McCracken county has been heretofore sold by any collecting officer, or by other proceedings on behalf of said county for taxes due McCracken county, and bought by said county, it shall be lawful for said county in its name to file a petition in equity in the McCracken Court of Common Pleas, or other court of said county that may have civil equitable jurisdiction, against the owner, his heirs, or assigns, or devisees (as the case may be), of such real estate so sold, as aforesaid, and bought by said county, describing the same with reasonable certainty, and also make defendant to the suit the owner, by purchase, if any, of such real estate, and all mortgagees or other incumbrancers, if any, of said land at the time suit was brought; and it shall be lawful for the county, the plaintiff in the suit, to subject such real estate *in rem*, by the judgment of the court, and have a sale of such land under the same, for the satisfaction of the amount of the price at which the county may have bid off such real estate at the collecting officer's sale of the same, or under other proceedings, with interest thereon at six per cent. per annum from the date of such sale until paid, and all costs of the action, including an attorney's fee of five dollars, which shall be taxed as costs in favor of the plaintiff in the action in every case of recovery. And the county of McCracken is hereby declared to have a continuing and subsisting lien upon the real estate for the satisfaction of the amount of such taxes, interest and costs aforesaid; and, in the enforcement of the same, as aforesaid, no plea of the Statute of Limitations shall be interposed thereto other than the statute of fifteen years."

This action was brought by the county on August 5th 1884, to enforce its alleged lien for the sums at which it had bid in the property at the collector's sales, and to sell the same therefor. More than five years had elapsed from the time the taxes were due, and also from the date of the collector's sales, before the purchase by the trust company; also before the passage of the act *supra*, and before the bringing of this action.

The general law in force during that time provides: "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability, * * * shall be commenced within five years next after the cause of action accrued." Gen. St., c. 71, art. 3, sect. 2.

The defence of five years' limitation was interposed. The county demurred to it, relying upon the provision in the act of February

18th 1884; "and in the enforcement of the same, as aforesaid, no plea of the Statute of Limitations shall be interposed thereto other than the statute of fifteen years;" and its validity is now in question; the demurrer having been overruled.

It is clear that, at the time of its passage, the collection of the claim could not have been enforced. The defence to it was perfect. Had the legislature the power to divest this right? The question is *res nova* in this state. Beyond doubt it may, before a claim is barred under the existing law, extend the time for its enforcement. Upon the other hand, it may shorten it, provided it affords a reasonable time for its assertion. It is urged, however, that time does not pay a debt; that the Statute of Limitations does not extinguish it, but merely relates to and withholds the remedy; and that, as it is founded upon public policy, it is a matter bounded only by legislative discretion.

It is agreed upon all hands that in cases where, by the lapse of time, a title to property is vested, that it cannot be divested by the legislature. This is not disputed by any authority known to us; but some of them have attempted to draw a distinction between such a case and the enforcement of a mere debt or obligation. Upon the other hand, it has been denied that there is any foundation whatever for a difference. It is true that in the one case the party in possession has been asserting a claim to the property; but in the case of a mere debt the effect of its enforcement, when barred by time, would be to divest the owner of his property; and it seems to us that there is little difference in fact, and none in principle, whether the case relate to a claim to property *in specie*, or damages for the breach of a contract or the enforcement of a debt merely. A retrospective law which divests a vested right is beyond the constitutional limit of legislative power. If the legal right be gone, the contract is discharged until it is in some legal way reaffirmed; and when the constitutional test is applied by the courts, as is their duty, it must be held that the legislature cannot make a new contract for the parties.

Some confusion has arisen by the failure of writers and jurists, in speaking of the obligation of a contract, to distinguish between the *legal* right and the *moral* one. Blackstone says: "that wherever there is a legal right there is a legal remedy," and "that the want of right and the want of remedy are the same thing." Undoubtedly, the legal remedy may be modified or changed without

impairing the legal right, if the remedy in the new form be not impaired; but it seems to us that it is illogical to hold that the remedy may be destroyed, and the legal right remain. A legal right is one which is protected by law, and the means of protection is the remedy; and it is not to be supposed that one can have his legal right seized by another, and yet be remediless. The existence of one implies the existence of the other, and one cannot exist without the other. It must be kept in mind that we are now speaking of the *legal* right, and not the *moral* obligation. Both may exist; the one being based upon civil and the other upon natural law. The latter is not, therefore, affected by a statute of limitation which bars the remedy and destroys the legal right.

We are aware that it was held in the earlier cases of *Graves* v. *Graves*, 2 Bibb 207, and *Chiles* v. *Calk*, 4 Id. 554, that such a statute bars the remedy, and not the right; but the later cases hold that it takes away the legal right; and they conform to sound reason, which says that when the law no longer protects a right, or affords the means of enforcement, it necessarily dies: *Stanley* v. *Earl*, 5 Litt. 281.

In *Carr's Ex'r* v. *Robinson*, 8 Bush 269, it is said: "If a promise was made after the running of the statute, this promise created a *new* obligation, and constituted a *new* cause of action, upon which suit should have been instituted. * * * After the lapse of fifteen years from the maturity of the note without suit the obligation or note is regarded as dead, and it cannot be revived by any promise to pay so as to authorize a suit on the original debt or obligation; but, if the promise is made during the fifteen years from the maturity of the note or obligation, it lengthens the *vitality* of the paper, and the statute commences to run from the date of the promise." To the same effect is the case of *Trousdale's Adm'r* v. *Anderson*, 9 Bush 277.

In *Shelby County* v. *Scearce*, 2 Duv. 576, this language was used: "The legal obligation of a contract is neither more nor less than a right to employ legal remedy to enforce or uphold the rights and duties of the parties to the contract. Wherever there is a legal remedy, there is a legal obligation; and wherever there is no legal remedy, there is no legal obligation."

We conclude, therefore, that both upon sound reasoning and former opinions of this court, that the statute of limitations of this state not only bars the remedy, but takes away the *legal* right.

It is therefore unnecessary to discuss the question whether the legislature would have the power, if our statute of limitations merely barred the remedy, leaving the legal right in existence, to take from a person what has become a perfect defence to a claim or debt, or to notice the cases upon the one side which hold that it has the right to do so in such a case, or those upon the other adopting the contrary view.

Wood, Lim., sect. 12, says: "If, before the statute bar has become complete, the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time passed is effaced, and the new law governs; that is, the period provided by the new law must run upon all existing claims in order to constitute a bar. In other words, the statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar."

In Cooley, Const. Lim. 455, it is said: "Regarding the circumstances under which a man may be said to have a vested right to a defence against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation."

The legal demand is discharged, leaving nothing but a moral obligation, binding only *in foro conscientiæ;* and hence a revival of it by legislative enactment involves, not only the creation of a new obligation, but the violation of a vested right. Puffendorf says: "A law can be repealed by the lawgiver, but the rights which have been acquired under it while it was in force do not thereby cease." This was the rule of the civil law, and has been strictly adhered to in England, where there is no express restriction upon the legislative power.

In the states of Massachusetts, Michigan, Arkansas, Mississippi, Pennsylvania, Iowa, Indiana, Tennessee, New Hampshire, Wiscon-

sin, Alabama, and perhaps others, it has been held that the legislature cannot extend the time, if the cause of action be already barred. It is true that in some of these states the rule is based upon a clause in the state constitution forbidding retrospective legislation; in others the statute of limitations is held to extinguish the obligation; while in others the rule rests upon the broad ground that the defence having become perfect, it is a vested right, which cannot be taken away by legislative action.

In the case of *Girdner* v. *Stevens*, 1 Heisk. 280, it was said: "We hold, both on authority and principle, where a cause of action is barred by a statute of limitations in force at the time the right to sue arose, and until the time of limitation expired, that the right to rely upon the statute as a defence is a vested right, that cannot be disturbed by subsequent legislation." In the cases of *Right* v. *Martin*, 11 Ind. 123; *Baldro* v. *Tolmie*, 1 Or. 176; and *Brown* v. *Parker*, 28 Wis. 21—it was held that a repealing act cannot renew a liability that has already been extinguished; and in *M'Kinney* v. *Springer*, 8 Blackf. 506, and *Rockport* v. *Walden*, 54 N. H. 167, that no subsequent statute can renew a right to sue which is already barred.

Beyond question the legislature cannot take the property of one citizen and give it to another. Neither can it do so indirectly, by depriving one of the right to set up a defence perfect in him at the time. It is a part of our fundamental law that no one can be deprived of his property without due process at law. This not only requires that a party shall be brought into court, but that he shall have the opportunity, when there, to assert any defence to which he has become entitled, and which will protect his property. We conclude that to hold the clause in question of the statute valid as to a claim without legal existence at the time of its passage would not only divest a party of a defence at the time perfect, but would make a new contract for the parties, and thus pass the constitutional limit of legislative action.

By the sixth section of an act of the legislature approved February 12, 1872 (Acts 1871–72, p. 339), it was declared that the county should have a perpetual lien on the property assessed for the tax until payment; and it is claimed, therefore, that there is no limitation as to its collection. The fourth section of the act gave the county the right, in case it had purchased the property for the taxes, to enforce a lien against it therefore by a suit in equity,

and sell the interest of the taxpayer therein. This lien was created when the assessment was made, and was but an incident of the tax, claim or obligation. There is no statute of limitation as to liens. If the claim becomes barred, the lien dies with it: *Tate* v. *Hawkins*, 81 Ky 577. If the claim could be made an incident of the lien, then "the statute of repose" would be defeated. As the claim no longer legally existed, the lien had nothing to support its existence.

Judgment affirmed.

As applied to cases where the time limited has not lapsed, statutes of limitations relate to the remedy, and not to the right; and it is competent for the legislature to extend the time or repeal the statute, or still further limit the time, provided that no statute can have the effect of barring a cause of action already existing without giving a reasonable time in which to prosecute the same: *Carr's Ex'rs* v. *Robinson*, 8 Bush 269; *Bigelow* v. *Bemis*, 2 Allen 496; *Rockport* v. *Walden's Ex'rs*, 54 N. H. 167: *Piatt* v. *Vattier*, 1 McLean 146; *Bender* v. *Crawford*, 33 Tex. 745; *Dwight* v. *Overton*, 35 Id. 390; *Lewis* v. *Davidson*, 51 Id. 251.

It is clear upon authority, that the lapse of time limited by statutes, for the bringing of an action, not only bars the remedy, but extinguishes the right to real property and *specific* personal property, and that the power of the legislature does not extend to the removing of such bar and the divesting of rights thus vested: *Wynn* v. *Lee*, 5 Ga. 217; *Newcombe* v. *Leavitt*, 22 Ala. 631; *Chiles* v. *Jones*, 4 Dana 479; *Harback* v. *Miller*, 4 Neb. 31; *Graffius* v. *Tottenham*, 1 W. & S. 488; *Schall* v. *W. V. Rd.*, 35 Penn. St. 204; *Thompson* v. *Caldwell*, 3 Litt. (Ky.) 136; *Garth's Ex'rs* v. *Barksdale*, 5 Munf. (Va.) 101; *Newby's Adm's* v. *Blakey*, 3 Hen. & Munf. (Va.) 57; *Sprecker* v. *Wakeley*, 11 Wis. 432; *Hill* v. *Kricke*, Id. 442; *Knox* v. *Cleveland*, 13 Id. 245; *Brent* v. *Chapman*, 5 Cranch 358; *Shelby* v. *Guy*, 11 Wheat. 361; *Leffingwell* v. *Warren*, 2 Black (U. S.) 599; *Campbell* v. *Holt*, 6 Sup. Ct. Rep. 209; *Stocker* v. *Berry*, 1 Ld. Raym. 741; *Atkyns* v. *Horde*, 1 Burr. 119; *Stokes* v. *Berry*, 2 Salk. 421; *Barwick* v. *Thompson*, 7 Term.Rep. 488.

It is a good defence to an action for the recovery of *specific* property in a jurisdiction where the time limited for bringing the action has not lapsed, that the right to the property has vested under the laws of another state: *Newcombe* v. *Leavitt*, 22 Ala. 631: *Wynn* v. *Lea*, 5 Ga. 217; *Shelby* v. *Guy*, 11 Wheat. 361.

It is also well settled, that where a state constitution forbids "retrospective" law it is not competent for the legislature to remove the bar of the Statute of Limitations, either to the recovery of specific property, or of a debt or damages: *Davis* v. *Minor*, 1 How. (Miss.) 183; *Woart* v. *Winnick*, 3 N. H. 473.

In other cases, courts have held that the repeal of the statute did not revive a cause of action for debt or damages already barred; but they have so held, generally, on the ground that such was not the intention of the legislature, rather than for the reason, that the legislature did not possess the power to remove the bar: *Robb* v. *Harlan*, 7 Penn. St. 292; *Kinsman* v. *Cambridge*, 121 Mass. 558: *Ball* v. *Wyeth*, 99 Id. 338; *Prentice* v. *Dehon*, 10 Allen 353; *Bradford* v. *Shine*, 13 Fla. 393; *Couch* v. *McKee*, 1 Eng. (Ark.) 493; *Moore* v. *McLendon*, 5 Id. 512; *Lowry* v. *Keyes*, 14 Vt. 66; *Wires* v. *Farr*, 25 Id. 41.

On the power of a legislature, where the state constitution does not forbid re-

trospective laws, to remove the bar of the statute against bringing an action other than for the recovery of specific property, the authorities do not warrant the unqualified negative that the text writers assume. The Supreme Court of the United States declared, in a recent case, that the legislature possessed such power; "It may, therefore, very well be held, that in an action to recover real or personal property, where the question is as to the removal of the bar of the Statute of Limitations, by a legislative act, passed after the bar has become perfect, that such act deprives the party of his property, without due process of law. The reason is, that by the law in existence before the repealing act, the property has become the defendant's. Both the legal title and the real ownership had become invested in him, and to give the act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law. But we are of opinion that, to remove the bar which the Statute of Limitations enables a debtor to interpose, to prevent the payment of his debt, stands on very different grounds. * *

"That the proposition is sound, that in regard to debt or *assumpsit* on contract the remedy alone is gone and not the obligation, is obvious from a class of cases which have never been disputed. (1) It is uniformly conceded that the debt is a sufficient consideration for a new promise to pay made after the bar has become perfect. (2) It has been held in all the English courts that though the right of action may be barred in the country where the defendant resides or has resided and where the contract was made, so that the bar in that jurisdiction is complete, it is no defence if he can be found to a suit in another country. * * *

"The right does not enter into or become part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made:" *Campbell* v. *Holt*, 6 Sup. Ct. Rep. 209.

In *Jones* v. *Jones*, 18 Ala. 248, the court said: "But it is contended that there is no difference between the effect of the statute when applied to property held adversely, and when applied to contracts for the payment of money. It is, however, sufficient to observe, that when property, whether real or personal, is held adversely, the statute operates on the title, and when the bar is complete the title of the original owner is defeated and the adverse possessor has the complete title. * * * But in the case of a contract there is no such thing as adverse possession; the remedy alone is affected by the statute and not the debt itself."

And again in *Swickard* v. *Bailey*, 3 Kan. 507, it was said: "When the law that deprived his remedy thereon is repealed, the obligation of the contract is not thereby revived; that never was extinguished. But the inability to maintain a suit to enforce it is removed. The situation of the parties is as if the law had never existed, unless there be saving clauses. * * *

"Many persons are misled by failing to observe the distinction between the effects of acts creating prescriptions and acts of limitation merely. The former operate under certain circumstances to vest the title to property in the possessor to the same extent and effect that a purchase and conveyance would do; and a repeal thereof would, if effectual, divest him thereof, thereby directly interfering with vested rights. The latter operate solely upon the remedy and may be changed, modified or repealed without affecting vested rights. It would be somewhat paradoxical to say, that a man has a vested right to avoid the payment of a just and legal debt."

This distinction seems to be recognised in other cases: *Wright* v. *Oakley*, 5

Met. 400; *Smart* v. *Baugh*, 3 J. J. Marsh. 364.

On the other hand, the doctrine of the principal case is supported by the authority of text writers, and by the weight of precedent. In *Girdner* v. *Stephens*, 1 Heisk. (Tenn.) 280, cited in the principal case, it was said, that "there can be no difference in principle whether it is a right to recover land or personal property *in specie* or damages for the breach of a contract or for a tort."

And, in speaking of a law declared unconstitutional because "retrospective," another court said: "It is a maxim that there is no right without a corresponding remedy; by which I understand that they are dependent terms; that one cannot exist without the other; that the idea of a right is predicated on and necessarily carries with it as essential to its existence the means also of enforcing it; and the moment the remedy is destroyed, the right must go with it:" *Davis* v. *Minor*, 1 How. (Miss.) 183.

Of the many authorities cited in approval of the doctrine of the principal case, a number were either decided without argument or are so imperfectly reported as to carry little weight: *Martin* v. *Martin*, 35 Ala. 560; *Goodman* v. *Munks*, 8 Port. (Ala.) 84; *Forsyth* v. *Ripley*, 2 Greene (Ia.) 181; *Stipp* v. *Brown*, 2 Ind. 647; *Right* v. *Martin*, 11 Id. 123; *M'Kinney* v. *Springer*, 8 Blackf. (Ind.) 506; *Atkinson* v. *Dunlap*, 50 Me. 111; *Woodman* v. *Fulton*, 47 Miss. 682; *Ryder* v. *Wilson's Ex'rs*, 41 N. J. L. 9; *Burch* v. *Newbury*, 6 Seld. 374; *Baker* v. *Stonebraker's Adm'rs*, 36 Mo. 339; *M'Merty* v. *Morrison*, 62 Id. 140; *Harrison* v. *Stacy*, 6 Rob. (La.) 15; *Baldro* v. *Tolmie*, 1 Or. 176; *Trim* v. *M'Pherson*, 7 Cald (Tenn.) 15; *Yancy* v. *Yancy*, 5 Heisk. (Tenn.) 353; *Brown* v. *Parker*, 28 Wis. 21. See also Wood Lim., sect 12; Aug. Lim. sect. 23, n. 3; Cooley Const. Lim. 365.

Where the time limited for enforcing a claim in a certain form of action has lapsed, and the bar against such an action is complete, but there yet remains another form of action by which the claim may be enforced, it is within the power of the legislature to remove the bar against the form of action so barred. Such action would probably not be considered in any state as interfering with vested rights: *Kipp* v. *Johnson*, 31 Minn. 360; s. c. 27 N. W. Rep. 957.

CHAS. A. ROBBINS.

Lincoln, Neb.

Supreme Court of Indiana.

STATE EX REL. ANDREWS v. WEBBER ET AL.

School trustees have authority to require that a reasonable time shall be given to the study and practice of music in the public schools, and a text-book for that purpose provided by each pupil; and where a pupil is expelled for refusal to comply with such requirement, unless some good cause be shown for such refusal, although made under his father's directions, mandamus will not lie to compel the pupil's reinstatement.

APPEAL from La Porte Circuit Court.

L. A. Cole & J. H. Bradley, for appellant.

Andrew Anderson and Mortimer Nye, for appellee.